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In The

Supreme Court of the United States

October Term, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

and

GEORGE PRICE, ET AL.,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has participated in voting cases before this Court, both as direct counsel, *see, e.g., Holder v. Hall*, 114 S.Ct. 2581 (1994), *Miller v. Johnson*, 115 S.Ct. 2475 (1995), and as *amicus curiae*, *see, e.g., United States v. Hays*, 115 S.Ct. 2431 (1995).

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Fund was established for the purpose of assisting African Americans in securing their constitutional and civil rights. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (noting Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation"). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See e.g., United Jewish Org. v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Shaw v. Hunt*, 1996 WL 315870 (U.S. June 13, 1996); and *Bush v. Vera*, 1996 WL 315857 (U.S. June 13, 1996).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The appeal of this declaratory judgment action under Section 5 of the Voting Rights Act presents two separate issues: (1) whether the district court erred in holding that the Bossier Parish School Board carried its burden of proving a lack of discriminatory purpose in enacting its redistricting plan, and (2) whether a violation of Section 2 of the Voting Rights Act provides an independent basis for denying preclearance under Section 5. *Amici* agree that, in this case, it is unnecessary for the Court to reach the second issue, because the district court majority clearly erred in applying the purpose prong of Section 5, and its decision must be reversed on that basis. In the event, however, that the Court reaches the second issue, this *amici* brief is submitted to describe the context and legislative history of amended Section 2 which clearly demonstrate Congress' intent to assure that a voting change violating Section 2 of the Act would not be required to receive preclearance under Section 5 of the Act. To avoid repetition of the arguments in the principal briefs, the *amici* brief is limited to this latter issue, as to which *amici* have a special interest based on their involvement as counsel in past Section 5 cases that have addressed this issue. *See Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995) (three-judge court); *Texas v. United States*, 1995 WL 769160 (D.D.C. 1995) (three-judge court).

The legislative history of the 1982 amendments and extension of the Voting Rights Act show that Congress intended for the results standard of Section 2 to apply to Section 5 preclearance. Congress was well aware of the limitations of the retrogression standard of *Beer v. United States*, 425 U.S. 130 (1976), when it extended and

amended the Act in 1982. The Senate Report that accompanied the amendments provides that "[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982).

The principal cosponsors of the 1982 amendments, Senator Kennedy and Representative Sensenbrenner, reiterated on the floors of the Senate and House during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2." 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner). Representative Edwards, a sponsor of the final bill and chair of the House subcommittee with jurisdiction over the extension of the Act, concurred with Representative Sensenbrenner's interpretation of the bill. 128 Cong. Rec. H3840-41.

Congress also acted with knowledge of the Attorney General's then established practice of denying preclearance to changes which violated other provisions of the Act. When Congress reenacts a statute and voices its approval of an administrative or other interpretation of the statute, as it did in the Senate Report, Congress is treated as having adopted that interpretation, and the courts are bound by it.

The Senate Report is entitled to greater weight than any other of the legislative history. This Court has described the Senate Report as being "the authoritative

source" for construction of the 1982 amendments to the Act. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986). It has been the established practice of the Court, moreover, to examine the applicable committee reports to determine congressional intent and the meaning of specific provisions of the Voting Rights Act, particularly Section 5, where the statute itself was silent or ambiguous.

While Congress did not amend Section 5, it did amend the Voting Rights Acts and provided that amended Section 2 was to apply to preclearance. It is common for Congress to add a provision to an act and apply it to a second provision of the same act without changing the language of the second provision.

Some voting changes are not amenable to analysis under a retrogression standard. A change from appointed to elected county commissioners, for example, would be covered by Section 5, but it might be difficult to determine the effect of such a change based upon a retrogression analysis. In other cases, there may be no practice or procedure *at all* that can be used as a benchmark for determining retrogression, *e.g.*, where a newly incorporated college district or municipality selects for the first time a method of conducting elections. Under the circumstances, a voting plan which fairly reflects the strength of the minority community as it exists would furnish the logical and appropriate basis for comparison.

The application of Section 2 to preclearance would not cause a major or disruptive change in the administration of Section 5. The Attorney General has administered the statute in such a manner in the past. The purpose or effect standards would continue to apply and dispose of

the vast majority of submitted voting changes. It would make very little sense from the standpoint of public policy and conserving judicial resources to allow violations of one section of the Voting Rights Act (Section 2) to be approved by another (Section 5). Such a result would undercut the enforcement mechanisms and the overall purpose of the Act. The evidence shows that Congress intended to correct the anomalies of *Beer* by applying Section 2 to Section 5 preclearance.

ARGUMENT

I. Section 2 Applies to Section 5 Preclearance

The legislative history of the 1982 amendments and extension of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, make it clear that Congress intended for the results standard of Section 2 to apply fully to Section 5 preclearance. Accordingly, a covered jurisdiction such as Bossier Parish would be entitled to preclearance of its voting changes only if it showed that they did not "result" in discrimination as that term has been defined by Congress and the Supreme Court. *Thornburg v. Gingles*, 478 U.S. 30, 35-8, 48-51 (1986).[2]

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[2] The issue of the applicability of Section 2 to Section 5 was presented in *City of Lockhart v. United States*, 460 U.S. 124, 133 n.9 (1983), but because the district court had not passed on it this Court declined to grant review in the first instance.

A. Interpretation of Section 5 Effects Test Prior to 1982

A majority of the Court, in a divided opinion, held in *Beer v. United States*, 425 U.S. 130 (1976), that only changes which were retrogressive or affirmatively diminished minority voting rights were prohibited by the "effect" language of Section 5.

Beer, however, was by its own terms ambiguous, for while the Court adopted a retrogression test, the Court nonetheless acknowledged that an ameliorative submission would be objectionable under Section 5 if it "so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141. Cases cited by the majority in *Beer* as illustrative of the applicable constitutional standard included *White v. Regester*, 412 U.S. 755 (1972), which applied an effect standard in minority vote dilution cases. *See Thornburg v. Gingles*, 478 U.S. at 35 (describing *White v. Regester* as embodying a "results test").[3] Thus, *Beer* itself may properly be said to contain an anti-dilution exception to the very retrogression standard which it purported to establish.[4]

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[3] *Washington v. Davis*, 426 U.S. 299 (1976), and *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held respectively that proof of a discriminatory purpose was required for a violation of the Fourteenth or Fifteenth Amendments, were decided after *Beer*.

[4] The retrogression standard of *Beer* was strongly criticized by legal commentators. Principal objections were that it sanctioned and perpetuated vote dilution, rewarded jurisdictions with the worst histories of discrimination against minority voters, and largely ignored the legislative history and underlying purposes of the Voting Rights Act. Gayle Binion, "The Interpretation of Section 5 of the 1965 Voting Rights Act: A

In recognition of its limitations and anomalies, the courts created a number of exceptions to the strict application of the retrogression principle. For example, the District of Columbia court has held that a new legislative plan cannot be approved, even if it is not retrogressive compared with the preexisting legislative plan, if it diminishes minority voting strength when compared with an intervening court ordered plan. *Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980); *Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 461 U.S. 912 (1983). Preexisting districts that have not themselves been precleared may also not be used in determining if a submission is retrogressive. *Mississippi v. Smith*, 541 F.Supp. at 1332. *Accord*, 28 C.F.R. § 51.54(b)(3).

In *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171 (D.D.C. 1978) (three-judge court), *aff'd mem.*, 439 U.S. 999 (1981), the court created another important exception to *Beer* where an existing plan was malapportioned. Wilkes County, which was 47% black, sought preclearance of a change from district to at-large elections. It argued that the proposed change did not have a discriminatory effect within the meaning of *Beer* because even if blacks were not able to elect candidates of their choice

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Retrospective on the Role of Courts," 32 *W.Pol.Q.* 154, 171 (1979); Richard L. Engstrom, "Racial Vote Dilution: Supreme Court Interpretation of Section 5 of the Voting Rights Act," 4 *So.U.L.Rev.* 139, 162 (1978); Mark E. Haddad, "Getting Results Under Section 5 of the Voting Rights Act," 94 *Yale L.J.* 139 (1984).

at-large, neither did they control any of the preexisting single member districts. The court rejected the county's argument:

> Since the existing districts are severely malapportioned, it is appropriate, in measuring the effect of the voting changes, to compare the voting changes with options for properly apportioned single-member district plans.

450 F.Supp. at 1178. Based upon the census, if Wilkes County had been divided into fairly drawn single-member districts of equal population, the black population in one district could have been as high as 71%. Using the proper basis for comparison, the court concluded that blacks were worse off under the change, and that "the at-large method has . . . a racially discriminatory effect." *Id.*

B. Congressional Action in 1982

Congress was well aware of *Beer* and its limitations when it extended and amended the Voting Rights Act in 1982. In amending Section 2 it incorporated the results standard for determining the lawfulness of voting practices, and provided that the amended statute was to apply to Section 5 preclearance. According to the Senate Report that accompanied the amendments:

> Under the rule of *Beer v. United States* . . . a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' . . . In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure so discriminates as to violate section 2.

S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (citations omitted).[5]

The principal cosponsors of the 1982 amendments, Senator Kennedy and Representative Sensenbrenner, reiterated on the floors of the Senate and House during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2." 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner). Representative Edwards, a sponsor of the final bill and chair of the House subcommittee with jurisdiction over the extension of the Act, concurred with Representative Sensenbrenner's interpretation of the bill. 128 Cong. Rec. H3840-41.

Congress also acted with knowledge of the Attorney General's then established practice of denying preclearance to changes which violated other provisions of the Act. The Attorney General, for example, had consistently denied Section 5 preclearance to changes which violated Section 4(f)(4) of the Act, a provision requiring

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[5] Given the ambiguity in the effect standard, resort to the legislative history to determine its meaning is both necessary and proper. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Court has regularly applied this principle in construing the Voting Rights Act. *See, e.g., Johnson v. DeGrandy*, 129 L.Ed.2d 775, 795 (1994); *Perkins v. Matthews*, 400 U.S. 379, 389 n.8 (1971).

certain jurisdictions to implement bilingual voting procedures. Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1659 (1982) [hereinafter Voting Rights Act Hearings (1982)]. This interpretation of Section 5 was reported to Congress by William Bradford Reynolds, Assistant Attorney General for Civil Rights, when it considered the extension and amendment of the Act in 1982. Voting Rights Act Hearings (1982) at 1659, 1720.

In its discussion of *Beer*, the Senate Report also noted and approved the Attorney General's practice of not applying a strict retrogression test, but treating submissions "on a case-by-case basis, 'in light of all the facts.' " S. Rep. No. 417 at 12 n.31. When Congress reenacts a statute and voices its approval of an administrative or other interpretation of the statute, as it did in the Senate Report, "Congress is treated as having adopted that interpretation, and the Court is bound thereby." *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 134 (1978). *Accord, Lorillard v. Pons*, 434 U.S. 573, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

Congress further confirmed its intention that Section 2 standards were to apply to preclearance when it conducted oversight hearings in 1985 on the Attorney General's proposed revisions of the regulations governing Section 5. According to the House Report, "the Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section

2 standards in the course of making Section 5 determinations." Subcommittee on Civil and Constitutional Rights of the Comm. on the Judiciary U.S. House of Representatives, 99th Cong., 2d Sess., Voting Rights Act: Proposed Section 5 Regulations 5 (Comm. Print 1986 Ser. No. 9) [hereinafter Comm. Print (1986)].[6]

The lower court's observation that Section 2 and Section 5 are "different," App. 15a, is a non sequitor. The sections *are* different. The issue, however, is whether Section 2 standards are to be applied in Section 5 preclearance. The legislative history indicates that they should be.

C. The Attorney General's Regulations

In light of the 1982 amendments, the Attorney General adopted regulations in 1987 calling for the application of Section 2 standards to Section 5 preclearance. The regulations, which were widely circulated prior to their

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[6] Following those hearings, prominent members of Congress endorsed this construction of the Act in correspondence addressed to the Attorney General following rumors that the Department of Justice would abandon the application of Section 2 standards in the Section 5 review process. Senator Dole, for example, stated that he had " 'a vital interest in assuring that the Voting Rights Act is interpreted . . . consistent with Congress' intent. Preclearing voting changes that violate Section 2 would threaten the integrity of Section 5 as a barrier to all illegal voting discrimination and be in direct conflict with the law's legislative history.' " *See* Heather K. Way, "A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2", 74 *Tex.L.Rev.* 1439, 1468 (1996) (quoting this and other letters).

promulgation[7] and were the subject of Congressional hearings, *see* Oversight Hearings on Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary House of Representatives, 99th Cong., 1st Sess. (1985) [hereinafter Oversight Hearings], provide that:

> In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance.

28 C.F.R. § 51.55(b)(2).

Since the 1982 amendments and the promulgation of the regulations, the Attorney General has continued to object to submissions if they violated Section 2. *See* Comm. Print (1986) at 4; Oversight Hearings (1985) at 210-12, 229-34 (describing Section 5 objections in 1983 to redistricting plans from Amite and Oktibbeha Counties, Mississippi on the grounds that they violated amended Section 2). While the regulations and decisions of the Attorney General are not binding upon the courts, the contemporaneous administrative construction of the Act by the Attorney General is persuasive evidence of the intent of Congress in enacting the 1982 amendments.

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[7] The regulations were published in proposed form for comment. 50 Fed. Reg. 19122 (May 6, 1985).

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. at 131.[8]

D. The Legislative History Cannot Be Discounted

Despite the evidence noted above, the court below held that Section 2 does not apply to Section 5 because the legislative history is not extensive. App. 17a. The Senate Report, as the report commended to the full Senate and representing the collective understanding of the members involved in drafting and studying the proposed legislation, is entitled to greater weight than any other of the legislative history. *See Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) ("the authoritative source for finding the legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation,' " *quoting Zuber v. Allen*, 396 U.S. 168, 186 (1969); *American Jewish Congress v. Kreps*, 574 F.2d 624, 629 n.36 (D.C.Cir. 1978) ("[s]ince the conclusions in the conference report were commended to the entire Congress, they carry greater weight than other of the legislative history"). In addition, the Supreme Court has described the Senate Report as being "the authoritative source" for construction of the 1982 amendments to the Act. *Thornburg v. Gingles*, 478 U.S. at 43 n.7.

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[8] In *Miller v. Johnson*, 115 S.Ct. 2475, 2493 (1995), the Court confirmed the retrogression standard of the effect prong of Section 5, but the issue of the incorporation of Section 2 standards into preclearance was not presented, and thus not decided, in *Miller*.

In *Thornburg v. Gingles*, the *amicus* supporting the appellants argued that the report represented "a compromise among conflicting 'factions,' and thus is somehow less authoritative than most Committee Reports." 478 U.S. at 43 n.7. The Supreme Court rejected the claim.

> We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.

Id. The Court went on to rely extensively on the Senate Report and cited it numerous times in construing amended Section 2. 478 U.S. at 43-8.

It has been the established practice of the Court, moreover, to examine the applicable committee reports to determine congressional intent and the meaning of specific provisions of the Voting Rights Act, particularly Section 5, where the statute itself was silent or ambiguous. In *Beer*, in determining how to measure discriminatory effect, as to which Section 5 itself was silent, the Court relied mainly upon the House Report of the 1975 extension of the Act. 425 U.S. at 141 (citing H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)). In *City of Rome v. United States*, 446 U.S. 156, 168-69 (1980), the Court resolved the question whether individual jurisdictions could bailout from Section 5 coverage by examining the House and Senate Reports. 446 U.S. at 168-69 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), and S. Rep. No. 162, 89th Cong., 1st Sess. (1965)). In *United States v. Board of Commissioners of Sheffield County, Alabama*, in concluding that

subjurisdictions were subject to preclearance by virtue of statewide Section 5 coverage, the Court found particularly "significant" the discussion of the issue in the House and Senate reports. 435 U.S. at 134 (citing S. Rep. No. 295, 94th Cong., 2d Sess. 12 (1975), and H.R. Rep. No. 196 at 5). In *McDaniel v. Sanchez*, 452 U.S. 130 (1981), the Court discussed the 1975 committee reports at length in holding that any voting change, including those ordered into effect by a local federal court, which reflects the policy choices of elected officials is subject to Section 5. 452 U.S. at 146-51 (citing S. Rep. No. 295 and H.R. Rep. No. 196). In *Chisom v. Roemer*, 501 U.S. 380, 393-394 ns.20, 21, 395 n.22 (1991) (citing S. Rep. No. 417), and *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), the Court found that state appellate and trial court judges were "representatives" within the meaning of Section 2 based, *inter alia*, upon the 1982 Senate Report. Clearly, there is no basis for contending that the Section 2 incorporation argument fails because it relies primarily upon the Senate Report, App. 17a; the report is the authoritative source of construction of the Act.

The claim that the legislative history is not extensive also discounts the fact that the principal cosponsors of the 1982 amendments stated during the floor debates that Section 2 was to apply to preclearance. Because these members of Congress were sponsors and principal architects of the 1982 amendments, their views "deserv[e] to be accorded substantial weight." *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964); *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982) (the statements of a sponsor of a bill "are an authoritative guide to the statute's construction"); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564

(1976). Every time the issue was directly addressed – in the debates and in the Senate Report – the conclusion was that Section 2 was applicable to Section 5.[9]

E. Congress Did Amend the Voting Rights Act

The lower court also held that Congress did not intend to import Section 2 standards into Section 5 because it did not amend the latter statute. App. 20a. Congress did, however, amend the Voting Rights Act and provided that amended Section 2 was to apply to pre-clearance.

It is common for Congress to add a provision to an act and apply it to a second provision of the same act without changing the language of the second provision. For example, Congress enacted the Civil Rights Restoration Act of 1987 in response to *Grove City College v. Bell*, 465 U.S. 555 (1984),[10] to amend four pre-existing civil rights acts, *i.e.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Age Discrimination Act of 1975, 42 U.S.C. § 6102; and, Title VI of the Civil Rights

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[9] That the floor debate was limited is not surprising in view of the fact that Section 5 preclearance (as opposed to its duration) was not a very controversial issue. It was the amendment of Section 2 that absorbed the attention of Congress. Comm. Print (1986) at 4.

[10] *Grove City* held that discrimination in a "program or activity" of a college didn't subject the institution as a whole to the nondiscrimination provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

Act of 1964, 42 U.S.C. § 2000d, and provide that discrimination was prohibited throughout entire institutions or agencies if any part received federal financial assistance. The Civil Rights Restoration Act did not, however, make any changes or add any language to the coverage or fund termination provisions of the pre-existing acts. S. Rep. No. 64, 100th Cong., 2d Sess. (1987). Moreover, in three of the four instances, amendment was accomplished by adding an entirely separate provision defining the term "program or activity" in a broad, institution-wide manner. Title IX was amended by 20 U.S.C. § 1687; the Age Discrimination Act was amended by 42 U.S.C. § 6107; and, Title VI was amended by 28 U.S.C. § 2000d-4. In only one instance was the statute creating the prohibition of discrimination itself amended, the Rehabilitation Act of 1973, 29 U.S.C. § 794(b).

Congress did the same thing when it enacted the 1982 amendments to the Voting Rights Act as it did when it passed the Civil Rights Restoration Act of 1987 amending the pre-existing civil rights statutes. It did not add new language to Section 5, but instead amended Section 2 and provided in the legislative history that Section 2 was to apply to preclearance. Given its broad authority to enforce the Fourteenth and Fifteenth Amendments by appropriate legislation, *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27, 337 (1966), Congress did not exceed its powers in acting as it did.

F. Some Voting Changes Are Not Amenable to Analysis Under the Retrogression Standard

The argument that the anti-dilution standard of Section 2 does not apply to Section 5 does not take proper account of the fact that the effect of some voting changes is simply not amenable to analysis under a retrogression standard. A change from appointed to elected county commissioners, for example, would be covered by Section 5, *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984), *Horry County v. United States*, 449 F.Supp. 990, 995 (D.D.C. 1978), but it might be extremely difficult to determine the effect of such a change based upon a retrogression analysis. If the change were to at-large elections or single-member districts which fragmented the minority community and diluted its voting strength, would it nonetheless be entitled to preclearance if under the old system no minorities had been appointed to the commission, and there was no evidence that the change was racially motivated? The difficulty with retrogression analysis under these circumstances is that there is no pre-existing electoral system which can be used as a basis for comparing the effect of the new practice.

In other cases, there may be no practice or procedure *at all* that can be used as a benchmark for determining retrogression, *e.g.*, where a newly incorporated college district or municipality selects for the first time a method of conducting elections. *See* 28 C.F.R. § 51.54(b)(4). Under the circumstances, a voting plan which "fairly reflects" the strength of the minority community as it exists would furnish the logical and appropriate basis for comparison. *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

The application of Section 2 to preclearance would not cause a major or disruptive change in the administration of Section 5. Indeed, the Attorney General has administered the statute in such a manner in the past. The purpose or effect standards would continue to apply and dispose of the vast majority of submitted voting changes. According to the Attorney General, during his review of the thousands of voting changes submitted since the 1982 amendments, "only a handful . . . even arguably presented th[e] possibility" of being disposed of on Section 2 grounds. 52 Fed. Reg. 486-90 (1987) (comments to 28 C.F.R. § 51). In those relatively rare – but important – cases where a retrogression analysis was not applicable, or where a voting change which did not have a discriminatory purpose or effect nevertheless "resulted" in discrimination, an anti-dilution standard should apply.

It would make very little sense from the standpoint of public policy and conserving judicial resources to allow violations of one section of the Voting Rights Act (Section 2) to be approved by another (Section 5). Such a paradigm would undercut the enforcement mechanisms and the overall purpose of the Act.[11] The evidence shows that Congress intended to correct the anomalies of *Beer* by applying Section 2 to Section 5 preclearance.

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[11] *See Sheffield*, 435 U.S. at 136 ("The only recourse available would be the one Congress found to be unsatisfactory: repeated litigation").

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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